No. 11596

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

HENRY BRODERICK, INC., *Appellant*,

vs.

CLARK SQUIRE, individually and as Collector of Internal Revenue for the District of Washington, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANT

EGGERMAN, ROSLING & WILLIAMS,
D. G. EGGERMAN,
JOSEPH J. LANZA,
Attorneys for Appellant.
918 Joseph Vance Building,
Seattle 1, Washington.

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INDEX

TABLE OF CASES

STATUTES

REGULATIONS

COURT RULES

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BRIEF OF APPELLANT

NATURE OF ACTION

This is a suit in three causes of action for the recovery of taxes assessed by the Government and paid under protest by appellant under the Federal Insurance Contributions Act (Chap. 9A of the Internal Revenue Code) for the period from April 1, 1943 to March 31, 1945 and under the Federal Unemployment Tax Act (Chap. 9C of the Internal Revenue Code) for the years 1943 and 1944.

JURISDICTION

District Court

Jurisdiction of this action was conferred on the District Court by Section 24(20) of the Judicial Code.

Taxes in the sum of $1,938.63 were assessed under the Federal Insurance Contributions Act for the period from April 1, 1943 to March 31, 1945 (Tr. 29).

Taxes in the sum of $1,042.00 for 1943, and the sum of $1,380.05 for 1944 were assessed under the Federal Unemployment Tax Act (Tr. 29).

All three sums were paid under protest by appellant on August 4, 1945 (Tr. 29, 30).

On August 11, 1945, which was within 4 years of such payment as provided by Section 3313 of the Internal Revenue Code, claims for refund of the taxes so paid were filed with the Collector of Internal Revenue (Tr. 30).

Under date of January 2, 1946, the Commissioner of Internal Revenue notified appellant that its claims for refund were disallowed (Tr. 30).

This action was commenced on February 13, 1946, which was within two years of such disallowance, as provided by Section 3772(a)(2) of the Internal Revenue Code (Tr. 30).

Circuit Court

Jurisdiction of this court is invoked by virtue of Section 128(a) of the Judicial Code.

Judgment of the District Court dismissing the action with prejudice and with costs was entered on January 27, 1947 (Tr. 32, 33).

Notice of Appeal was filed March 17, 1947, which was within three months from the date of entry thereof, as required by Section 240-8(c) of the Judicial Code (Tr. 33, 34).

Cost Bond on Appeal in the sum of $250.00 was filed with the Notice of Appeal on March 17, 1947, pursuant to Rule 73(c) of the Rules of Civil Procedure (Tr. 34-37).

Statement of Points on which Appellant Intends to Rely on Appeal was served March 14, 1947, and filed in the District Court on March 17, 1947, as required by Rule 75(d) of the Rules of Civil Procedure (Tr. 37-48).

Appellant's Designation of the Record, Proceedings and Evidence to be contained in the Record on Appeal was served on March 21, 1947 and filed with the District Court on March 24, 1947, as required by Rule 75(a) of the Rules of Civil Procedure (Tr. 38-40). Appellee's Designation of Additional Portions of the Record and Proceedings to be Contained on the Record on Appeal was served on March 25, 1947 and filed with the District Court on March 29, 1947 as permitted by Rule 75(a) of the Rules of Civil Procedure (Tr. 41-43).

The Record on Appeal was filed with this court on April 24, 1947 which was within 40 days from the date of the Notice of Appeal as required by Rule 73(g) of the Rules of Civil Procedure (Tr. 145-146).

Appellant's Statement of Points on which it Intends to Rely on Appeal and Designation of the Record Deemed Necessary for the Consideration Thereof was filed in this court on April 24, 1947 as required by Rule 19, par. 6, of the Rules of the United States Circuit Court of Appeals for the 9th Circuit (Tr. 146-147).

Copies of printed record was received by appellant on June 19, 1947, and appellant's brief is required to be served and filed within 30 days thereof, pursuant to Rule 20, par. 1, of the Rules of the United States Circuit Court of Appeals for the 9th Circuit.

QUESTION INVOLVED

Does the contract and operating arrangement between Henry Broderick, Inc., and the real estate brokers give rise to an employer-employee relationship within the meaning of the Federal Unemployment and Federal Insurance Tax Acts, and the regulations issued thereunder.

The District Court answered the question in the affirmative.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are:

Chapter 9A Internal Revenue Code (26 U.S. C.A., Secs. 1400-1432) commonly known as the Federal Insurance Contributions Act;

Chapter 9C Internal Revenue Code (26 U.S. C.A., Secs. 1600-1611) commonly known as the Federal Unemployment Tax Act;

Regulation 106, Sec. 402.204 (pertaining to the Federal Insurance Contributions Act);

Regulation 107, Sec. 403.204 (pertaining to the Federal Unemployment Tax Act).

Statutes

Neither of the two Federal statutes referred to contain a definition of "employer" or "employee."

During the tax periods herein involved, both statutes contained the same definition with respect to "wages" and "employment" as follows:

Wages

> "The term 'wages' means all remuneration for employment, * * * (Internal Revenue Code, Secs. 1426 and 1607(b)."

Employment

> "The term 'employment' means any service * * * of whatever nature, performed after December 31, 1939, by an employee for the person employing him * * * except * * *."

Regulations

Section 403.204 of Regulation 107 and Section 402.204 of Regulation 106 read the same and provide as follows:

> "Who are employees.—Every individual is an employee if the relationship between him and the person for whom services are performed has the relationship of employer and employee.
>
> "Generally such relationship exists when the person for whim services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In

this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

"Generally, physicians, lawyers, dentists, veterinrians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

"Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

"If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor.

"The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

"No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

"Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment within the meaning of the Act."

STATEMENT OF THE CASE

The evidence adduced by appellant is not disputed. It consists of the testimony of three of its officers and one of the brokers whose relationship is involved herein. Defendants offered no evidence except certain exhibits which were admitted during cross-examination of appellant's witnesses. The facts, as thus disclosed, may be briefly summarized as follows:

Appellant is a corporation duly licensed as a real estate broker under the laws of the State of Washington, and has engaged in that business since 1911 (Tr. 65).

Appellant's business is divided into three separate departments known as the Property Management De-

partment, Real Estate Department, and Insurance Department (Tr. 76).

In addition to its relations with the real estate brokers involved herein, appellant employs eleven or twelve real estate salesmen who work in the Property Management Department (Tr. 66, 77).

These salesmen hold *salesmen's* real estate licenses, as distinguished from *brokers'* licenses, which are paid for by appellant, including the premium on their bonds (Tr. 66).

These salesmen are *required* to attend daily sales meetings in appellant's office which are presided over by the Rental Manager (Tr. 66). At these meetings, the salesmen report on the assignments they were given the day before, and upon their activities thereon, and are also given assignments for the ensuing day (Tr. 67).

Complete supervision and control is exercised by appellant over these salesmen and they are required to keep regular office hours (Tr. 67).

They devote the major portion of their time to work in connection with the management of property, and approximately 25% to the making of sales and property management leases (Tr. 68, 112).

Entire control is exercised over them, however, as to their sales or lease activities, and they work only on specific assignments given to them by the Manager. They are told what prospects to see, and are required to report back to the head of the department as to the result of their interviews (Tr. 68).

They are on a regular stipulated salary which is

paid twice a month (Tr. 68, 111). However, if they are successful in negotiating a sale or lease, they receive in addition to their salary, 40% of the total commission that is earned by appellant. This commission is paid to them on their regular salary day (Tr. 69, 82, 113). If in the meantime, appellant has received the commission from a sale or lease, it is deposited in its profit and loss account (Tr. 69, 112, 115, 118). Appellant takes care of all of the sales expense of these salesmen, including their license and bond premiums (Tr. 69, 111, 113).

No issue is involved herein as to such salesmen, as they are admittedly employees covered by the Acts. The foregoing evidence, however, was adduced to emphasize the contrast between appellant's relations with its salesmen, and its relations with the real estate brokers involved in this case.

The brokers associated with appellant, and whose status is the subject of inquiry herein, work out of the Real Estate Department (Tr. 77). Prior to 1937 or 1938, the relationship between them was not evidenced by any written contract (Tr. 70, 71). However, in 1937 or 1938, written contracts were entered into, sample of which has been admitted in evidence as Plaintiff's Exhibit 1 (Tr. 43-47). This agreement was in use during all the periods here involved (Tr. 70). There was no difference, however, between the operations of the brokers under their oral agreement and under the written contract (Tr. 71).

Under this written agreement, both parties warrant that they are licensed real estate brokers in the State

of Washington, and that each will keep his license as broker in full force and effect, and will pay all fees and taxes arising out of his activities as a broker (Tr. 43). Under this agreement, appellant agrees to furnish the broker with a desk, telephone, switchboard service, and necessary stenographic service (Tr. 44).

The agreement also provides that appellant will make available to the broker all current listings of the office, except such as it may find expedient to place exclusively in the temporary possession of some other broker (Tr. 44).

The broker agrees to exert his best efforts to sell, lease or rent any real estate listed with appellant, and to solicit additional listings and customers in the name of appellant (Tr. 45).

The parties to the contract likewise agree to divide the commission realized on deals in which the broker has participated, upon an equal basis (Tr. 45).

Under the contract, appellant is under no obligation to make advances for expenses or commissions, and the broker agrees to furnish transportation for prospects at his own expense, and to pay his own entertainment expense, club dues, and any other expense incident to his business as a real estate broker (Tr. 46). The broker is to have entire discretion as to the handling of "leads" and prospects and as to his conduct as broker, and as to the means of securing listings, handling prospects, and consummating deals, free from control of appellant as to manner and method of conducting his services as a real estate broker, it being the express intent that the broker is an "inde-

pendent contractor, and not a servant, employee, joint adventurer or partner" of appellant (Tr. 46, 47).

Under paragraph 9, the agreement is terminable by either party at any time upon notice (Tr. 47).

The testimony as to the method of operation between appellant and the associate brokers involved herein is as follows:

These brokers are selected on the basis of experience and financial responsibility (Tr. 88, 101). Many of them were engaged in the real estate business prior to associating with appellant (Tr. 86, 87, 131, 137). They are free to, and in fact, some of them actually engage in other business activities (Tr. 89, 90, 91, 134).

These brokers are not required to keep any regular office hours, or maintain any definite routine, and are free to put in as much time as they desire (Tr. 72, 89, 91, 132, 133).

Most of the work of these brokers is done outside of the office of appellant. The earnest money receipts are signed usually in the purchaser's home or place of business, and closing details are worked out in an attorney's office or in an escrow company's office. A great deal of their work is transacted in their own home, where they receive phone calls and carry on some of their correspondence with respect to the real estate business (Tr. 72, 91, 92, 94, 116, 135).

They determine their own strategy and procedure for effecting a sale without any supervision whatsoever by appellant (Tr. 72, 88, 90, 92, 135).

The broker is not limited to any specific area, nor is there any limitation upon the character of the property which he may sell. If there is any preference in regard thereto, it is of the broker's own choosing (Tr. 90, 91, 99, 134, 138).

They carry a real estate broker's license, which is obtained upon their own application, at their own expense, including the bond premiums. They own their own cars, and take care of their own expenses, such as repairs, gas and insurance (Tr. 87, 97, 114, 131, 132, 133).

They do not carry any insignia of appellant on their automobiles (Tr. 103).

Meetings of these brokers are held, but there is no compulsion upon them to attend. Employee salesmen, however, are not permitted to attend brokers' meetings which are held in the Real Estate Department. No progress reports are required (Tr. 74, 86, 95, 100, 132).

Listings come to appellant either from advertising or from the brokers themselves (Tr. 77, 88). Occasionally, a broker secures a listing and gets an earnest money deposit before the listing gets to appellant (Tr. 85, 89). The listings obtained are taken in appellant's name (Tr. 100). An analysis of each listing is given to each broker, and all of them are free to work on the property. The first one who brings in an earnest money deposit, however, shares the commission with appellant if the deal is ultimately closed (Tr. 104, 107).

When an earnest money deposit is received, it is

placed in an escrow account with appellant, and the commission is divided between appellant and the broker *simultaneously* with the closing of the deal (where for the first time it is earned). At that time appellant deposits its half of the commission for the first time in its profit and loss account (Tr. 73, 82, 115). The broker receives no drawing account and is paid only a portion of the gross commission earned upon the consummation of the transaction in which he participated (Tr. 119).

If a broker is successful in getting an exclusive listing for appellant, he receives a commission whether or not he is the eventual selling broker. This listing commission comes out of the gross commission and is charged partly to appellant and partly from the share that goes to the selling broker. If, however, the broker who brings in the listing also makes the sale, the commission is divided equally (Tr. 93).

A broker's name and his residential phone number frequently appear in the advertising run by appellant. However, the fact that his name appears in an ad, does not prevent another broker associated with appellant from attempting to sell the property advertised (Tr. 91, 136, 139, 141).

Prospects who may call upon appellant's office, however, will be referred to the broker who is best qualified to handle that particular piece of property (Tr. 108).

Appellant furnishes at its own expense the brokers with stenographic and switchboard service, stationery and cards (Tr. 96).

The price at which the broker can sell the property is determined as a result of negotiations between the buyer and the seller (Tr. 94).

On July 30, 1945, appellant was notified that an assessment for additional Internal Revenue taxes for the period from April 1, 1943, to March 31, 1945, was being made on the ground that said broker salesmen were employees of appellant and taxable under the Federal Insurance Contributions Act, and demand was made upon it that the tax liability in the sum of $1,938.63 be paid within ten days thereof. In accordance with said demand, appellant paid this sum under protest on August 4, 1945 (Tr. 29).

Likewise, on July 26, 1945, appellant was notified that an assessment for additional Internal Revenue taxes for the year 1943 in the sum of $1,042.00, and for the year 1944 in the sum of $1,380.05 was being made on the ground that said broker salesmen were employees of appellant and taxable under the Federal Unemployment Tax Act, and demand was made upon it that said sums be paid within ten days thereof. In accordance with this demand, the sums were paid by appellant under protest on August 4, 1945 (Tr. 29, 30).

On August 11, 1945, appellant duly filed with the appellee, Collector of Internal Revenue for the District of Washington, for consideration of the Commissioner of Internal Revenue, its claims for refund for the amounts thus paid (Tr. 30).

Under date of January 2, 1946, the Commissioner of Internal Revenue notified appellant that its claims

for refund were disallowed. This action was timely brought on February 13, 1946 (Tr. 30).

Trial of the action was had on November 12, 1946 (Tr. 25, 32), and on December 11, 1946, the District Court filed a written memorandum opinion concluding that these brokers were employees of appellant and therefore the taxes levied were proper (Tr. 15-24).

On January 27, 1947, the District Court, in accordance with its written memorandum opinion, entered Findings of Fact and Conclusions of Law (Tr. 25-31) and Judgment dismissing appellant's complaint with prejudice and with costs (Tr. 32-33). This appeal followed.

SPECIFICATION OF ERRORS

The District Court erred in concluding from the undisputed facts that the relationship between appellant and the brokers was that of employer and employee within the meaning of the Federal Insurance Contributions Act and Federal Unemployment Tax Act, and that therefore the taxes were legally assessed and collected.

SUMMARY OF ARGUMENT

1. This court is not bound by the findings and conclusions of the District Court since there is no dispute on the facts.

2. Application of the standards announced by the U. S. Supreme Court in the *Silk* and *Greyvan* cases requires a conclusion that the employer-employee re-

lationship does not exist between appellant and the brokers:

(A) Absence of control over the brokers.

(B) Brokers' opportunities for profit and loss as dependent upon their own initiative and judgment.

(C) Brokers' investment in facilities.

(D) Lack of permanency in relation.

(E) Skill required on the part of the brokers.

(F) Other factors:

(1) Brokers have a proprietary interest in the commissions earned.

(2) Source of payment is from property owner and not from appellant.

3. The decisions of the overwhelming majority of state courts have denied the existence of an employer-employee relationship under state unemployment compensation acts to real estate brokers as well as real estate salesmen working under circumstances identical to those at bar.

ARGUMENT

This Court Is Not Bound By Findings and Conclusions of District Court.

In this case, the facts are not in dispute. The problem is one of construction and application of the taxing statutes. In such situations, the findings of the trial court are not conclusive and the appellate court is free to review the facts and to substitute its own judgment untrammelled by the findings and conclusions of the District Court.

United States v. Anderson (C.C.A. 7) 108 F.(2d) 475, 479;

United States v. Mitchell (C.C.A. 8) 104 F. (2d) 343;

Wigginton v. Order of U.C.T. of America (C.C.A. 7) 126 F.(2d) 659.

II.

Discussion of Standards Laid Down in the Silk and Greyvan Cases.

The United States Supreme Court, on June 16, 1947, announced certain standards for determining the application of the two Acts in question to individuals claimed to be independent contractors. These rules appear in a decision rendered by the court in *United States v. Silk*, and *Harrison v. Greyvan Lines, Inc.*, 91 Law Ed. Adv. op. 1335.

The court states that all factors must be considered in determining whether an individual rendering services is an employee or an independent contractor. Among such factors to be considered are (a) degrees

of control; (b) opportunities for profit or loss; (c) investment in facilities; (d) permanency of relation, and (e) skill required in the claimed independent operation.

However, the court points out that no one of these factors is controlling "nor is the list complete."

An analysis of the facts involved in the *Silk* and *Greyvan* cases will, we believe, prove helpful to this court in determining the question involved.

The taxpayers there were the Albert Silk Coal Co. and Greyvan Lines, Inc. Both companies sued to recover sums exacted from them by the Commissioner of Internal Revenue as employment taxes on employers under the Social Security Act. In both instances, the taxes were collected on assessments made administratively by the Commissioner because he concluded that the persons involved were employees.

Silk sold coal at retail. His premises consisted of two buildings, one was the office and the other a gathering place for workers, railroad tracks upon which carloads of coal were delivered by the railroad, and bins for the different types of coal. He paid those who worked as unloaders an agreed price per ton to unload coal from the railroad cars. These men would come to the yard when and as they pleased and were assigned a car to unload and a place to put the coal. They furnished their own tools which consisted of picks and shovels, worked when they wished and worked for others at will.

As to this type of workers, the Supreme Court held them to be employees and of the group that the Social

Security Act "was intended to aid." In arriving at this conclusion, the court pointed out that they provided only "simple tools," and that they had no opportunity to gain or lose except from the work of their hands and these tools. Furthermore, Silk was in a position to exercise all necessary supervision over their "simple tasks."

The next group of workers in the *Silk* case involved certain truck drivers who delivered the coal to the customer. Silk owned no trucks himself, but contracted with certain individuals, who owned their own trucks, to deliver the coal at a uniform price per ton. *The remuneration was paid to the trucker by Silk out of the price he received for the coal from the customer.*

When an order for coal was received in the company office, a bell was rung in the building used by the truckers. The truckers had voluntarily adopted a call list upon which their names came up in turn, and the top man on the list was given an opportunity to deliver the coal ordered.

The truckers were not instructed how to do their jobs, but were merely given a ticket telling them where the coal was to be delivered and whether the charge was to be collected or not.

Any damage caused by the truckers was paid by the company. The District Court found that the truckers could, and often did, refuse to make a delivery without penalty. Further, the court found that the truckers could come and go as they pleased and frequently did leave the premises without permission. They also could and did haul for others when they pleased.

They paid all the expenses of operati
and furnished extra help necessary to
the coal and all equipment except th
bins. No record was kept of their time
paid after each trip, at the end of th
end of the week, as they might reque

Both the District and the Circuit c
the truckers were independent contr
lowed recovery of the taxes paid. The
agreed with the decisions below that
rangement left the driver-owners so m
ity they must be held to be independe

The status of truckers was also i
Greyvan case. The taxpayer there was
rier by motor truck, operating throug
States and parts of Canada, carrying
hold furniture.

While its principal office was in Ch
tained agencies to solicit business in
larger cities in the areas it served,
contracted to move goods. It contract
men under which the truckmen were r
exclusively for Greyvan, and to fur

due the company from shippers or consignees a
turn in such moneys at the office to which the
ported after delivering a shipment, to post bond
cash deposits with the company pending a fina
tlement of accounts. They were further requir
personally drive their trucks at all times or be pr
on the truck when a competent relief driver was
ing (except in emergencies, when a substitute
be employed with the approval of the company)
to follow all rules, regulations, and instructions
company.

All contracts or bills of lading for the shipme
goods were to be between the company and the sh
The company's instructions covered directions t
truckmen as to where and when to load freig
freight was tendered the truckmen, they were
obligation to notify the company so that it
complete the contract for shipment in its own

As remuneration, the truckmen received fro
company a percentage of the tariff charged b
company varying between 50% and 52% and a
up to 3% for satisfactory performance of the se

The contract was terminable at any time by

Cargo insurance was carried by the company. All permits, certificates and franchises "necessary to the operation of the vehicle in the service of the company as a motor carrier under any federal or state law" were to be obtained *at the company's expense.*

A manual of instructions was given by the company to the truckmen. This manual purported to regulate in detail the conduct of the truckmen in the performance of their duties. However, a company official testified that the manual was impractical and that no attempt was made to enforce it.

The company also agreed with the union that any truckman must first be a member of the union, and that grievances would be referred to representatives of the company and the union.

The company also had some trucks driven by truckmen who were admittedly company employees. Operations by the company, however, under the two systems were carried out in the same manner.

Both the District Court and the Circuit Court of Appeals held that the truckmen were independent contractors, and the Supreme Court affirmed their status as such.

The Supreme Court, after discussing the purpose of the Social Security Act, adopts the view that application of the social security legislation should follow the same rule that was applied to the National Labor Relations Act in *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, wherein the court approved the statement of the National Labor Relations Board that "the primary consideration in the

determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the act comprehend securing to the individual the rights guaranteed and protection afforded by the act."

The court, however, lays down the following important admonition:

> "This, of course, does not leave courts free to determine the employer-employee relationship without regard to the provisions of the act. The taxpayer must be an 'employer' and the man who receives wages an 'employee.' There is no indication that Congress intended to change normal business relationships through which one business organization obtains the services of another to perform a portion of production or distribution."

Using the *Silk* and *Greyvan* cases, therefore, as a guide, the conclusion is inescapable that the brokers in the case at bar are clearly not "employees" or appellant the "employer" within the meaning of the Social Security Act. In fact, the truckmen in the *Greyvan* case presented a much stronger case for the government from the standpoint of control, initiative, judgment and energy, than do the brokers in the case at bar. It is to be noted particularly that the truckmen were required to paint the designation "Greyvan Lines" on their trucks, and to report their positions at intervals to company dispatchers who issued orders for their movements. They were likewise required to follow all rules, regulations and instructions of the company.

Application of the several tests announced by the

court likewise conclusively demonstrates the non-existence of the necessary employer-employee relationship between the parties involved in the case at bar.

(A) Degrees of Control

The brokers in question are required by the agreement, and in practice actually are licensed as real estate *brokers* by the State of Washington under a statute which clearly recognizes the broker as having an independent business "free from the direction, control, or management" of another. Remington's Revised Statutes of Washington (1941 Supp.) Sec. 8340-25(1).

The agreement states that the broker shall be "free from control" of appellant "as to the manner and method" of conducting his services as a broker (Tr. 47).

In actual practice, there is no requirement that the brokers attend sales meetings, make reports, keep regular office hours, maintain any definite routine, or make any specific calls during the day. On the contrary, they are free to come and go as they please, put in as much time as they see fit, determine their own strategy and procedure for effecting a sale, without restriction as to territory or character of property to be sold. They are not required to give their entire time to the business of selling real estate, but may and some do engage in independent businesses.

(B) Opportunities for Profit and Loss

The opportunity for profit rests entirely on their own initiative, judgment and energy. They stand to profit if their efforts are successful in consummating a sale. If they are not successful in obtaining a purchaser for the property, they get nothing for their efforts despite the time and expense expended. As will be seen from the list of their earnings (Tr. 10) no two brokers earned the same, although each presumably was afforded an equal opportunity to sell the same properties. Their endeavors may be likened to a foot race, wherein their individual talents, skill and energy, determine the winner. They have no drawing accounts and receive no remuneration whatsoever for their efforts unless a sale is consummated as a result of their activities.

(C) Investment in Facilities

The broker owns his own car and pays his own expenses such as insurance, repairs, oil, gasoline, license fees, business and occupation taxes, broker's license and bond premiums. They are, like the driver-owners in the *Silk* and *Greyvan* cases, "small businessmen."

(D) Permanency of Relation

Like the truckers involved in the *Silk* and *Greyvan* cases, the contractual relationship herein was terminable at any time by either party.

(E) Skill Required

In order to qualify for a broker's license, an elementary understanding of the principles of real es-

tate conveyancing, the general purposes and general legal effects of deeds, mortgages, land contracts of sale, exchanges, rental and option agreements, and leases, of the elementary principles of land economics and appraisals, and an elementary understanding of the obligations between principal and agent, of the principles of real estate practice and the canons of business ethics pertaining thereto, is required. Remington's Revised Statutes of Washington (1941 Supp.) Sec. 8340-35.

These brokers are selected on the basis of experience and financial responsibility. Most of them were engaged in the real estate business prior to their association with appellant. Their work is not of a routine or simple nature. Individual personality, "approach," psychology, salesmanship, imagination, initiative, judgment, and energy play a vital part in their success.

(F) Other Factors

The Supreme Court in the *Silk* and *Greyvan* cases recognized that other factors may be present in determining coverage under the Social Security Act. The following additional factors should therefore be considered:

1. *The broker has a proprietary interest in the commission that is earned.* Thus, the half of the commission to which the broker is entitled upon completion of the deal, never was intended to and never does become the property of appellant. Appellant is a trustee, and is required to account for it to the broker immediately upon consummation of the sale, when for the first time it is earned.

This view was adopted by the Third Circuit Court of Appeals in *Koehler v. Myers*, 21 F.(2d) 596, wherein the court held that the receiver of a real estate broker (Tucker) in possession of the commission money prior to division with the salesman, was a trustee to the extent of one-half of the commission for the benefit of the salesman (Myers). In that case, the salesman sold certain property that was listed with a real estate broker. Before the commission was paid, the real estate broker became insolvent and a receiver was appointed. The owner of the property refused to pay the commission, and the receiver brought suit and recovered judgment for the claimed commission.

The salesman then petitioned to be allowed priority over the common creditors as to his portion of the commission, contending that he was entitled to one-half of the commission as his own individual property. The receiver contended that the entire commission belonged to the insolvent broker, and that the salesman was merely a general creditor.

The District Court sustained the position of the salesman and ordered the receiver to pay one-half of the commission to the salesman. On appeal, the Circuit Court affirmed, and quoted the following statement of the District Court with approval:

> " 'Obviously, the relation between the parties is not one of employer and employee. The corporation assumed no obligations to Myers other than to furnish him office room. Myers assumed no obligation as to the corporation other than to share with them such commissions as might be earned as a result of his efforts. * * * As to

> Myers' moiety, the receiver must be deemed in equity as a trustee for Myers.'
>
> "'* * * He and Tucker were in a joint enterprise. Tucker was to secure the listing of the properties furnish 'desk and telephone and stenographic service' and the general office facilities required by a salesman, while Myers, on his part, was to negotiate sales for the properties listed in the office of Tucker."

The receiver also contended that the New Jersey statute defining a real estate salesman as a person who is "employed by a licensed real estate broker" included the work of Myers and showed that he was in the employ of Tucker. Answering this contention, the court said:

> "But that act does not create a new definition of employer and employee. A real estate broker may employ a real estate salesman and pay him in commissions, but at the same time a real estate broker and a salesman may enter into a joint enterprise, the broker furnishing the office and equipment generally, and the salesman supplying the active service in selling real estate. It was not a case of selling real estate 'for others,' but for themselves and dividing equally the commission. When the property was sold, one-half the commission belonged to Myers, was his individual property."

That the real estate broker had a "proprietary interest" in the commission, as held in the *Koehler* case has also been announced, under similar or analagous facts in *Yearwood v. U.S.* (D.C. La. 1944) 55 F. Supp. 295 and 299; *Guaranty Mortgage Co. v. Bryant,* 179 Tenn. 579, 168 S.W.(2d) 182 (1943); *Henry Broderick Inc.*

v. Riley, 22 Wn.(2d) 760, 157 P.(2d) 954 (1945), and *Realty Mortgage & S. Co. v. Oklahoma Employment Security Commission*, 169 P.(2d) 761 (Okla., 1945).

Obviously if the broker's interest in a specific commission is a *proprietary one*, such share *cannot* be considered "wages of an 'employee'."

2. The commission when and if earned is drawn from an escrow or trust account and simultaneously divided between appellant and the broker. Until the division is made, no part of the same ever becomes the property of the appellant or enters its profit and loss account. In fact under the evidence no part of the commission can become the property of either until it is earned by the consummation of the deal whereupon it is simultaneously divided. The source of the commission that may be earned by the broker emanates from the property owner—and not from appellant.

These additional factors are determinative of the non-existence of the employer-employee relationship, and have been so considered in the numerous cases involving the status of real estate brokers under the various state unemployment acts about to be discussed.

III.

The Overwhelming Majority of State Courts Have Denied the Existence of the Employer-Employee Relationship

The highest appellate courts of the states of Missouri, New York, Oklahoma, Tennessee, and Washington, under identical facts have denied the application of the state unemployment acts to real estate brokers and salesmen. The state of California can likewise

be added to this list, although the cases emanating from that state do not involve facts identical to the case at bar. These cases will be discussed in chronological order.

In *A. J. Meyer v. Unemployment Compensation Commission*, 348 Mo. 147, 152 S.W.(2d) 184 (1941), the Supreme Court of Missouri, upon identical facts (except as to the presence of a written contract) held that there was no substantial evidence to support the ruling by the Commission that a real estate salesman was in employment within the meaning of the Missouri Unemployment Compensation Act, and that such a salesman was in effect an independent contractor.

The same result on identical facts was reached by the New York Court of Appeals in *In re Wilson-Sullivan Co.*, 289 N.Y. 110, 44 N.E.(2d) 387 (1942).

The Supreme Court of Tennessee, in *Guaranty Mortgage Co. v. Bryant*, 179 Tenn. 579, 168 S.W.(2d) 182 (1943), arrived at the same conclusion with respect to the Tennessee Unemployment Compensation Act, commenting as follows:

> "The arrangement between the parties amounted to nothing more than that the salesmen were furnished free office space, telephone, etc., for which complainant received one-half the commission earned and actually collected on sales made by the salesmen, complainant closing the deal. Commissions were not paid by complainant, but by the parties to the sale. Complainant did not pay, or promise to pay, any wages or commission to the salesmen. The situation was that the salesmen paid one-half of the commissions earned

by them to complainant, rather than that complainant was paying them commissions."

The identical facts herein were before the Supreme Court of the State of Washington in *Henry Broderick, Inc. v. Riley*, 22 Wn.(2d) 760, 157 P.(2d) 954 (1945), wherein it was unsuccessfully urged that the relation between appellant and these same brokers was that of employer and employee within the Washington Unemployment Compensation Act. The court, in holding that the evidence wholly failed to show that these brokers were in the "employment" of appellant said:

> "In the instant case, an association was formed between appellant and these brokers for the mutual benefit of both. What term the parties may have applied to the relationship is not binding upon us. Appellant contributed to such enterprise certain office facilities, and the brokers contributed their services. Each party, for his contribution to the enterprise, was to receive half of the commission coming in from the sale of real estate as the result of their joint efforts. *The half of the commission to which the broker was entitled upon completion of the deal, never was intended to and never did become the property of the appellant. It was the property of the broker from the time it was earned, and was so considered by both parties.* Appellant never agreed to pay and never did pay the brokers any wages or remuneration as those terms are defined in the statute, and was not in fact an employer of these brokers under the Act, nor was the contract here involved a contract of hire." (Italics ours)

The same conclusion was reached by the Washington Court in two other real estate cases, namely, *In re*

Coppage, 22 Wn.(2d) 802, 157 P.(2d) 977, and *Curtis v. Riley*, 22 Wn.(2d) 951, 157 P.(2d) 975.

The Supreme Court of Oklahoma, in *Realty Mortgage & S. Co. v. Oklahoma Employment Security Commission*, 169 P.(2d) 761 (1945), in a well-considered opinion likewise held that real estate salesmen were not in "employment" within the meaning of the Oklahoma unemployment statute, adopting in effect the joint venture theory of the Washington court (*Henry Broderick, Inc. v. Riley*, 22 Wn.(2d) 760, 157 P.(2d) 954), and of the Third Circuit Court of Appeals (*Koehler v. Myers*, 21 F.(2d) 596). The Oklahoma court after an exhaustive review of the authorities said:

> "In the instant case there is no obligation on the salesmen to perform any service for plaintiff, nor is plaintiff obligated to pay them for any service rendered. There is no contract of hire, express or implied. Rather, the association of plaintiff and the salesmen is in the nature of a joint venture, in which each party to the arrangement makes certain contributions and performs certain services in order to produce a result mutually profitable to them. Plaintiff contributes its offices, office equipment and personnel, and such information as it may have, or such real estate listings as it may receive, and its efforts to close deals made by the salesmen, and to collect the commission. The salesmen contribute their time and efforts, the expense of seeking out prospective purchasers or borrowers, and procuring from them contracts for the purchase of real estate or applications for loans. Each apparently considers that the arrangement is to their advantage. If it develops that it is not, either may ter-

minate it at any time. Plaintiff is no more the employer of the salesmen than it is their employee. Neither is in the employment of the other. Each performs his function, and receives his remuneration, not from the other, but from a third party. Plaintiff collects the commissions, and turns over to the salesmen their proportion thereof, but in so doing it acts merely as a collecting agency pursuant to its agreement with the salesman. If no commission is collected, the loss falls, not on plaintiff, but on both. Neither is performing the work of the other. Each is performing his allotted function in the joint enterprise."

The same result was reached by the Oklahoma court in *Sears-McCullough Mortgage Co. v. Oklahoma Employment Security Commission*, 172 P.(2d) 613 (1946), involving facts identical to those involved in the previous case.

As heretofore stated, the California court was not presented with facts exactly identical to the case at bar. However, some of the facts were quite similar, and therefore the decisions are worthy of note. Thus, in *California Employment Stabilization Commission v. Morris*, 28 Cal.(2d) 812, 172 P.(2d) 497 (1946), the Supreme Court of California, in an en banc decision, held that certain real estate salesmen selling *a realty company's own property* on commission, entirely unfettered by any directions as to method, time, territory or prospects, were independent contractors and therefore not in employment under the California unemployment act. Another distinction in the facts with the case at bar is that the salesmen there paid

for their own telephone, stenographers, stationery, postage and business cards.

The same result was reached as to similar real estate salesmen in *California Employment Stabilization Commission v. Norins Realty Co. Inc.*, 175 P.(2d) 217 (1946), which is likewise an en banc decision by the California Supreme Court.

CONCLUSION

These cases have determined what are "the normal business relationships," independent of the Acts involved herein, whereby business associations have been formed under similar or identical facts. They have held that the real estate broker has a "proprietary interest" in the commission and, according to some, that the broker is a joint venturer and according to others, an independent contractor. If either, the broker *cannot be an employee.* And the concept of "proprietary interest" is as remote as the poles from that of "wages" or "employee." There can therefore be no question but that the "*normal business relationship*" herein is not that of employer and employee.

Since the Supreme Court, in the cases of *United States v. Silk* and *Harrison v. Greyvan Lines, Inc.*, 91 Law Ed. Adv. op. 1335, has said:

> "The taxpayer must be an 'employer' and the man who receives wages an 'employee.' There is no indication that Congress intended to change normal business relationships,"

there is no employer-employee relation herein within the meaning of the Acts, and the judgment of the

District Court should be reversed with instructions to enter judgment in favor of appellant as prayed for.

Respectfully submitted,

EGGERMAN, ROSLING & WILLIAMS,

D. G. EGGERMAN,

JOSEPH J. LANZA,

Attorneys for Appellant.